

## St. John's Law Review

---

Volume 50  
Number 4 *Volume 50, Summer 1976, Number 4*

Article 11

---

August 2012

### CPLR 5201: Seider Jurisdiction Asserted in Case Involving Both Resident and Nonresident Plaintiffs

St. John's Law Review

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

---

#### Recommended Citation

St. John's Law Review (1976) "CPLR 5201: Seider Jurisdiction Asserted in Case Involving Both Resident and Nonresident Plaintiffs," *St. John's Law Review*. Vol. 50 : No. 4 , Article 11.  
Available at: <https://scholarship.law.stjohns.edu/lawreview/vol50/iss4/11>

This Recent Development in New York Law is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact [seljbyc@stjohns.edu](mailto:seljbyc@stjohns.edu).

ples, reached the opposite conclusion. Hopefully, its holding will not be followed in the future.

## ARTICLE 52 — ENFORCEMENT OF MONEY JUDGMENTS

*CPLR 5201: Seider jurisdiction asserted in case involving both resident and nonresident plaintiffs.*

That a nonresident's insurance policy issued by an insurer doing business in New York may be attached by a New York plaintiff for the purpose of obtaining jurisdiction in a suit based on an out-of-state accident was first recognized by the Court of Appeals in *Seider v. Roth*.<sup>88</sup> It is now well established as the law of New York.<sup>89</sup> Nevertheless, *Seider* attachment continues to receive criticism from commentators<sup>90</sup> and to create problems for courts

---

<sup>88</sup> 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). In *Seider*, a New York resident used CPLR 5201 and CPLR 6202 to attach an out-of-state defendant's automobile insurance policy, claiming that the insurer, who was doing business in New York, had an obligation to defend and indemnify the defendant, and that this obligation was an attachable debt.

<sup>89</sup> The constitutionality of *Seider* was upheld in *Minichiello v. Rosenberg*, 410 F.2d 106 (2d Cir. 1968), *aff'd en banc*, 410 F.2d 117, *cert. denied*, 396 U.S. 844 (1969). Much of the criticism of *Seider* stressed the lack of due process inherent in a suit which compels the defendant-insured, as well as his insurer, to litigate in a forum which was not connected with the underlying accident, thereby going beyond the jurisdictional "minimum contacts" test laid down by the Supreme Court in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). Even though the *Seider* attachment of an insurance policy is a quasi-in-rem action, and the minimum contacts theory is normally associated with in personam jurisdiction, it is not improper to assess jurisdiction over an intangible res in terms of fairness and contacts with the state. *Atkinson v. Superior Court*, 49 Cal. 2d 338, 316 P.2d 960 (1957) (*en banc*), *cert. denied*, 357 U.S. 569 (1958) (jurisdiction over a chose in action based upon a totality of the contacts). Using such an analysis, the majorities in *Simpson v. Loehmann*, 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967), *rehearing denied*, 21 N.Y.2d 990, 238 N.E.2d 319, 290 N.Y.S.2d 914 (1968), and *Minichiello* considered the New York residency of the injured plaintiff and the presence of the insurer within New York sufficient contacts with this State to allow quasi-in-rem jurisdiction. Furthermore, these courts reasoned that neither the insured nor the insurer are substantially prejudiced by a New York adjudication since the insurer is already present in the State, has contracted to defend the insured anywhere at anytime, and the insured will be reimbursed for expenses incurred in cooperation with the defense. *Minichiello v. Rosenberg*, 410 F.2d at 118-19; *Simpson v. Loehmann*, 21 N.Y.2d at 311, 234 N.E.2d at 672, 287 N.Y.S.2d at 637.

As long as the Supreme Court decision in *Harris v. Balk*, 198 U.S. 215 (1905), remains valid law, it is unlikely that *Seider* will be overturned on constitutional grounds. *Harris* allowed the garnishment of a debt wherever the debtor may be found. Moreover, the Supreme Court has had opportunities to declare *Seider* unconstitutional, but has declined to grant certiorari in every instance. See, e.g., *Victor v. Lyon Associates Inc.*, 21 N.Y.2d 695, 234 N.E.2d 459, 287 N.Y.S.2d 424 (1967), *appeal dismissed for want of a substantial federal question*, 393 U.S. 7 (1968). For further discussion of the constitutionality of *Seider*, see Note, *Seider v. Roth: The Constitutional Phase*, 43 ST. JOHN'S L. REV. 58 (1968).

<sup>90</sup> See, e.g., 7B MCKINNEY'S CPLR 5201, commentary at 16-76, (Supp. 1975); Note, *Jurisdiction in New York: A Proposed Reform*, 69 COLUM. L. REV. 1412 (1969); Comment, *Garnishment of Intangibles: Contingent Obligations and the Interstate Corporation*, 67 COLUM. L. REV. 550 (1967); Note, *Attachment of Liability Insurance Policies*, 53 CORNELL L. REV. 1108

struggling with the sometimes harsh effects of the doctrine.<sup>91</sup> To counteract some of this criticism and remedy some of the difficulties created by *Seider*, courts have increasingly relied on the doctrine of *forum non conveniens*.<sup>92</sup> This doctrine grants courts discretion to decline the exercise of jurisdiction where it appears that the present forum is only minimally connected with the controversy or that the plaintiff has engaged in forum shopping or harassment of the defendant in choosing an inconvenient forum.<sup>93</sup> Of course, exercise of this discretion is conditioned upon a finding by the court that there exists another forum in which the action can be brought<sup>94</sup> and that transfer of the action would be in the interest of justice and fairness.<sup>95</sup>

---

(1968); Comment, *Jurisdiction — Quasi In Rem: Seider v. Roth to Turner v. Evers — Wrong Means to the Right End*, 11 SAN DIEGO L. REV. 504 (1974).

<sup>91</sup> *Seider* has created serious questions concerning personal jurisdiction over the insured, *Podolsky v. Devinney*, 281 F. Supp. 488 (S.D.N.Y. 1968); *Simpson v. Loehmann*, 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967), *rehearing denied*, 21 N.Y.2d 990, 238 N.E.2d 319, 290 N.Y.S.2d 914 (1968); choice of law, *Tjepkema v. Kenney*, 31 App. Div. 2d 908, 298 N.Y.S.2d 175 (1st Dep't) (mem.), *appeal dismissed*, 24 N.Y.2d 942, 250 N.E.2d 68, 302 N.Y.S.2d 580 (1969), *discussed in* 7B MCKINNEY'S CPLR 5201, commentary at 34-35 (Supp. 1975); *res judicata* and collateral estoppel, *Minichiello v. Rosenberg*, 410 F.2d 106, *aff'd en banc*, 410 F.2d 117 (2d Cir. 1968), *cert. denied*, 396 U.S. 844 (1969); application of *Seider* doctrine to other than automobile insurers, *Flemming v. Williams*, 30 App. Div. 2d 834, 293 N.Y.S.2d 45 (2d Dep't 1968) (mem.).

*Seider* has met with little success in other jurisdictions considering its adoption. *Compare* *Sykes v. Beal*, 392 F. Supp. 1089 (D. Conn. 1975); *Javorek v. Superior Ct.*, 17 Cal. 3d 629, 552 P.2d 728, 131 Cal. Rptr. 768 (1976); *Kirchman v. Mikula*, 258 So. 2d 701 (La. App. 1972); *State ex rel. Government Emps.' Ins. Co. v. Lasky*, 454 S.W.2d 942 (Mo. App. 1970); *Jardine v. Donnelly*, 413 Pa. 474, 198 A.2d 513 (1964); *De Rentiis v. Lewis*, 106 R.I. 240, 258 A.2d 464 (1969); *Howard v. Allen*, 254 S.C. 455, 176 S.E.2d 127 (1970), *and* *Housley v. Anaconda Co.*, 19 Utah 2d 124, 427 P.2d 390 (1967) (rejecting *Seider*) *with* *Rintala v. Shoemaker*, 362 F. Supp. 1044 (D. Minn. 1973) (adopting *Seider*), *and* *Forbes v. Boynton*, 113 N.H. 617, 313 A.2d 129 (1973) (retaliatory adoption of *Seider*).

<sup>92</sup> The doctrine originated in the courts of England and Scotland during the 19th century. Its spread to this country was considerably aided by the publication of an oft-cited law review article by Paxton Blair. Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1 (1929) [hereinafter cited as Blair]. Blair discusses several of the early cases wherein jurisdiction, once having been properly obtained through attachment, transient service of process, or joinder of questionably necessary parties, was subsequently declined owing to unavailability of witnesses or evidence, unfairness, involvement of difficult questions of foreign law, or obvious harassment of the defendant. *Id.* at 20-30. See generally 1 WK&M ¶¶ 327.01-.03.

<sup>93</sup> Blair, *supra* note 92. A *forum non conveniens* objection should be raised at the earliest reasonable opportunity to avoid possible prejudice to the plaintiff and to demonstrate the defendant's good faith. Otherwise it may be considered waived. *Neumeier v. Kuehner*, 43 App. Div. 2d 109, 349 N.Y.S.2d 866 (4th Dep't 1973); *Lemonis v. Prudential Grace Lines, Inc.*, 176 N.Y.L.J. 3, July 6, 1976, at 7, col. 2 (Sup. Ct. N.Y. County). See generally Barrett, *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380, 380-89 (1947); Morley, *Forum Non Conveniens: Restraining Long-Arm Jurisdiction*, 68 NW. U.L. REV. 24, 24-26 (1973); *Developments in the Law — State-Court Jurisdiction*, 73 HARV. L. REV. 909, 1009-11 (1960).

<sup>94</sup> See, e.g., *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), wherein the Supreme Court stated that when "the doctrine of forum non conveniens comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them." *Id.* at 506-07. In *Gulf*, a Virginia plaintiff-warehouseman

Recently, in *Menefee v. Floyd & Beasley Transportation Co.*,<sup>96</sup> the Supreme Court, Nassau County, was confronted with a case wherein multiple plaintiffs, including both residents and nonresidents of New York, sought to invoke quasi-in-rem jurisdiction by effecting a *Seider* attachment of a nonresident defendant's insurance policy. The action arose out of an Alabama automobile accident in which five persons were killed when the car in which they were riding collided with defendant's bus. On the date of the accident, two of the decedents were New York residents. The remaining three passengers were residents of Rhode Island. Of the three defendants, two were residents of Alabama and a third, who failed to appear in court, was a resident of New York.<sup>97</sup> After careful balancing of the competing considerations, Justice Berman held that the court had jurisdiction over all the plaintiffs' claims and that New York was a proper and convenient forum in which to litigate.<sup>98</sup> The court emphasized that there was no other forum available in which to bring the suit.<sup>99</sup> Furthermore, after considering the relative inconvenience to all parties in regard to costs, ease of proof, and availability of witnesses, the court determined that the scale of equities for retaining jurisdiction tipped to the side of the plaintiffs.<sup>100</sup>

---

sued Gulf Oil Corp. for its alleged negligence in causing the destruction of his warehouse in Virginia. The only connection with New York was that Gulf was qualified to do business here. Because it appeared that every witness was located in Virginia and that the action was only brought in New York because New York juries generally awarded greater damages, the action was dismissed. *Id.* at 509-12.

<sup>95</sup> *Silver v. Great Am. Ins. Co.*, 29 N.Y.2d 356, 361, 278 N.E.2d 619, 622, 328 N.Y.S.2d 398, 402 (1972).

<sup>96</sup> 84 Misc. 2d 547, 378 N.Y.S.2d 555 (Sup. Ct. Nassau County 1975).

<sup>97</sup> *Id.* at 548-49, 378 N.Y.S.2d at 557.

<sup>98</sup> *Id.* at 550, 378 N.Y.S.2d at 558.

<sup>99</sup> *Id.* Due to timing and jurisdictional problems in other states, a finding that New York had no jurisdiction over the claims or that this State was an inconvenient forum for their assertion would have, in the opinion of the court, denied the plaintiffs a remedy in any forum since the statute of limitations had already run in Alabama and *Seider*-type jurisdiction had already been rejected in Rhode Island. The *Menefee* court did not discuss the possibility of requiring the defendant to waive the statute of limitations, or to agree to accept service of process in another forum in exchange for a dismissal on *forum non conveniens* grounds. Such conditional dismissals are common. See *Irrigation & Indus. Dev. Corp. v. Indag, S.A.*, 44 App. Div. 2d 543, 353 N.Y.S.2d 471 (1st Dep't 1974) (mem.), *aff'd*, 37 N.Y.2d 522, 337 N.E.2d 749, 375 N.Y.S.2d 296 (1975); *Ginsburgh v. Hearst Publishing Co.*, 5 App. Div. 2d 200, 170 N.Y.S.2d 691 (1st Dep't 1958), *aff'd*, 5 N.Y.2d 894, 156 N.E.2d 708, 183 N.Y.S.2d 77 (1959); *Sutton v. Garcia*, 80 Misc. 2d 690, 363 N.Y.S.2d 695 (Sup. Ct. N.Y. County 1974).

<sup>100</sup> 84 Misc. 2d at 551, 378 N.Y.S.2d at 558-59. Although the defendant might have had to transport witnesses from Alabama to testify on the issue of culpability, it is also true that five sets of families from New York and Rhode Island would be needed to testify to elements of damages for the plaintiffs. Additionally, plaintiffs intended calling witnesses from other parts of the country.

The court's holding appears contrary to the spirit of at least one appellate division ruling, *Vaage v. Lewis*,<sup>101</sup> wherein the court strictly construed the application of *Seider* jurisdiction. The *Vaage* court dismissed the *Seider*-based claim of a Norwegian plaintiff against a North Carolina defendant for injuries sustained in an automobile accident in North Carolina. Judge Christ, speaking for the court, concluded that both *forum non conveniens* and due process considerations mandated dismissal.<sup>102</sup> The court found that there was an insufficient nexus with New York to justify an exercise of jurisdiction, since none of the parties were New York residents and the accident itself had occurred out-of-state.<sup>103</sup> It should be noted, however, that *Menefee* is not completely without precedent. In *McHugh v. Paley*,<sup>104</sup> for example, the court asserted jurisdiction over both a resident and a nonresident defendant in a suit brought by a nonresident plaintiff and based on a foreign tort. In so holding, the court emphasized the fact that New York was the only possible forum wherein the action could be brought.<sup>105</sup>

The doctrine of *forum non conveniens* is used only to dismiss a case over which the court actually does have jurisdiction. Thus, in the absence of a proper jurisdictional base, the doctrine need not be considered. In *Menefee* and the related *Seider*-type cases, how-

---

<sup>101</sup> 29 App. Div. 2d 315, 288 N.Y.S.2d 521 (2d Dep't 1968), discussed in 7B MCKINNEY'S CPLR 5201, commentary at 42-43 (Supp. 1975).

<sup>102</sup> 29 App. Div. 2d at 318, 288 N.Y.S.2d at 524-25.

<sup>103</sup> Judge Christ declared that an exercise of jurisdiction in this case would deprive the defendants of "basic due process." *Id.* Moreover, the court indicated it is the public policy of New York to deter the "influx here of unwanted and unnecessary lawsuits." *Id.* at 318, 288 N.Y.S.2d at 524 (citation omitted).

<sup>104</sup> 63 Misc. 2d 1092, 314 N.Y.S.2d 208 (Sup. Ct. N.Y. County 1970), discussed in 7B MCKINNEY'S CPLR 5201, commentary at 20-21 (Supp. 1975).

<sup>105</sup> Recognizing that *Seider* is not ordinarily available to one nonresident in an action against another, the *McHugh* court emphasized that the nonresident defendant was an employee of Paley, the resident defendant, was driving a car owned by Paley, and was a crucial witness for the defense of Paley, who was already within the court's jurisdiction. 63 Misc. 2d at 1093, 1096-97, 314 N.Y.S.2d at 211, 214. It was considered more fair and reasonable to assert jurisdiction over this nonresident due to the special circumstances involved than it would be in the case of the ordinary nonresident. Although the precedential value of the case is somewhat weakened by its partial dependence on the since overruled case of *De La Bouillierie v. De Vienne*, 300 N.Y. 60, 89 N.E.2d 15 (1949), overruled, *Silver v. Great Am. Ins. Co.*, 29 N.Y.2d 356, 278 N.E.2d 619, 328 N.Y.S.2d 398 (1972), see note 109 *infra*, the considerations of equity which were central to the *McHugh* court's holding remain. If the plaintiff, a disabled welfare recipient in Massachusetts, had not been allowed to prosecute her claim in New York, she would have been denied a remedy in any forum. 63 Misc. 2d at 1095, 314 N.Y.S.2d at 212. Readily distinguished from *McHugh* is *Vath v. Israel*, 80 Misc. 2d 759, 364 N.Y.S.2d 97 (Sup. Ct. Queens County 1975), where the court dismissed a multiple-plaintiff *Seider* action on other grounds, but in dicta stated that New York was an inconvenient forum under CPLR 327 because the contacts with New York were too tenuous. Only one of two plaintiffs was allegedly a New York resident, but even he had a New Jersey driver's license.

ever, this distinction seems to have been blurred.<sup>106</sup> Conceptually, *Seider* jurisdiction is a form of quasi-in-rem jurisdiction with the jurisdictional res being the insurance company's intangible obligation to defend and indemnify its insured. Given the res, such factors as the plaintiff's residency, although relevant to *forum non conveniens*, theoretically should not affect the existence of jurisdiction. But, because this obligation or debt exists in every state in which the insurer does any business, the Court of Appeals for the Second Circuit has indicated that absent some other nexus with the forum state, such as residency of the plaintiff, *Seider* jurisdiction might very well be unconstitutional.<sup>107</sup>

It should be noted that the reasons advanced in *Vaage* for denying jurisdiction over a nonresident's claim are not entirely applicable to the multiple plaintiff situation. Refusing to assert jurisdiction over nonresidents in such a case would not help to deter the "influx here of unwanted and unnecessary lawsuits"<sup>108</sup> since a major portion of the action will probably be tried in New York regardless of the disposition of the nonresident plaintiffs' claims.<sup>109</sup> In addition, it is difficult to see how entertainment of the

---

<sup>106</sup> Emphasis on fairness and equity has led to a tendency on the part of courts to intermix discussion of minimum contacts/due process analysis with the *forum non conveniens* doctrine. Morley, *Forum Non Conveniens: Restraining Long-Arm Jurisdiction*, 68 Nw. U.L. REV. 24, 27-34 (1973). But it is clear that even where contacts exist between the forum and the defendant which satisfy the minimum contacts test for jurisdiction, the forum may, nevertheless, be inconvenient for purposes of trying the action. *Kilpatrick v. Texas & P. Ry.*, 166 F.2d 788, 790-91 (2d Cir.), cert. denied, 335 U.S. 814 (1948); *J.F. Pritchard & Co. v. Dow Chem. of Canada, Ltd.*, 331 F. Supp. 1215, 1218-19 (W.D. Mo. 1971), aff'd, 462 F.2d 998 (8th Cir. 1972).

<sup>107</sup> *Farrell v. Piedmont Aviation, Inc.*, 411 F.2d 812 (2d Cir.), cert. denied, 396 U.S. 840 (1969). In *Farrell*, the Court of Appeals for the Second Circuit held that a *Seider* attachment brought by nonresidents could not confer jurisdiction on the court because the action did not have sufficient contacts with New York, and that this result could not be circumvented by the appointment of a New Yorker to act as administrator of the nonresident plaintiffs' estates.

In *Varady v. Margolis*, 303 F. Supp. 23 (S.D.N.Y. 1968), discussed in 7B MCKINNEY'S CPLR 5201, commentary at 32-33 (Supp. 1975), the district court chose to split the litigation arising out of a *Seider* attachment because two of the five plaintiffs injured in the accident were not residents of New York. Strictly construing prior cases which stressed the importance of residency as a crucial factor in *Seider*'s constitutionality, the court determined that the claims of the nonresident plaintiffs were separate and independent from those of the New York residents. The nonresidents, therefore, could not make use of the *Seider* procedure to gain quasi-in-rem jurisdiction over the defendants. 303 F. Supp. at 25-26. None of the cases relied upon therein dealt with the multiple plaintiff problem which was present in *Varady* or *Menefee*.

<sup>108</sup> See note 103 *supra*.

<sup>109</sup> As the *Menefee* court stated, "[t]he same accident is involved and there is no indication that a heavy burden will be imposed upon the court in permitting these nonresident decedents' causes of action to be adjudicated in tandem with the resident decedents' cases." 84 Misc. 2d at 550, 378 N.Y.S.2d at 558. Prior to 1972, the *Menefee* court would have been unable to dismiss the New York resident's claims since it was the policy of New York courts to refuse to invoke the doctrine of *forum non conveniens* whenever either party was a New

nonresidents' claims would be a deprivation of the defendant's due process rights if the defendant and his insurer are already defending against the resident-plaintiffs' claims. The exercise of jurisdiction in such cases will both save all parties' time and money as well as benefit the public interest by avoiding multiplicity of suits.<sup>110</sup>

An additional argument, although not discussed by the *Menefee* court, supports the court's jurisdictional acceptance of the plaintiffs' claims. By following *Menefee*, New York will obviate the possibility of resident-plaintiffs obtaining a priority on limited insurance proceeds at the expense of nonresidents injured in the same accident.<sup>111</sup> Condoning such a priority would clearly be unpalatable as a matter of equity and fairness.

The *Menefee* decision amply demonstrates that the *Seider* doctrine is workable in complex, multiparty factual situations. It also indicates that remedies other than removal to federal court followed by a change of venue will be available to a seriously inconvenienced defendant.<sup>112</sup> Even more importantly, *Menefee* warns the practitioner that rote application of *Seider* procedure will not assure him a welcome mat in the forum of his choice. In the future,

---

York resident. *De La Bouillerie v. De Vienne*, 300 N.Y. 60, 62, 89 N.E.2d 15, 15-16 (1949). This rule was abrogated in *Silver v. Great Am. Ins. Co.*, 29 N.Y.2d 356, 278 N.E.2d 619, 328 N.Y.S.2d 398 (1972), wherein the Court of Appeals declared that mere residence is not the controlling factor, and that invocation of the *forum non conveniens* doctrine should turn on "considerations of justice, fairness and convenience." *Id.* at 361, 278 N.E.2d at 622, 328 N.Y.S.2d at 402. Shortly thereafter, rule 327 was proposed and added to the CPLR. EIGHTEENTH ANNUAL REPORT OF THE N.Y. JUDICIAL CONFERENCE A60 (1973). CPLR 327 provides:

When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just. *The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action.*

(emphasis added). Despite this new rule, the *Menefee* court was still convinced, with good cause, that New York was a more convenient forum, given the great number of witnesses that resided in, or near, New York. 84 Misc. 2d at 550-51, 378 N.Y.S.2d at 558-59.

<sup>110</sup> See 84 Misc. 2d at 550, 378 N.Y.S.2d at 558.

<sup>111</sup> This possible problem was discussed by the Court of Appeals for the Second Circuit in *Minichiello v. Rosenberg*, 410 F.2d 117, 119 (2d Cir.) (en banc), cert. denied, 396 U.S. 844 (1969), and by Professor Siegel in a series of articles on *Seider* written for the New York Law Journal. See, Siegel, *Seider v. Roth: U.S. Courts Faced with Special Problems*, 161 N.Y.L.J. 50, Mar. 13, 1969, at 5, col. 3.

<sup>112</sup> Federal procedure permits any defendant to remove an action from a state court to the federal district court where the action is pending if the federal court would have had original jurisdiction. 28 U.S.C. § 1441 (1970). Since the parties in a *Seider* action often satisfy diversity of citizenship requirements contained in 28 U.S.C. § 1332 (1970) this procedure may be available. Thereafter, "for the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404 (1970). Thus in a diversity of citizenship action, the suit might be transferred to the defendant's district. See, e.g., *Leinberger v. Webster*, 66 F.R.D. 28 (E.D.N.Y. 1975). Since New York now has a more flexible *forum non conveniens* rule, the federal courts will be less likely to transfer a case, owing to comity, once a New York court has refused to dismiss it. See 1 WK&M ¶ 327.03.

complaining and defending attorneys would be well advised to prepare strongly developed allegations concerning *forum non conveniens* as well as jurisdictional contacts in framing their pleadings.

#### ARTICLE 75 — ARBITRATION

*CPLR 7502(b): Contract statute of limitations applied to demand for arbitration.*

CPLR 7502(b) permits the statute of limitations to be asserted as a defense to a demand for arbitration when the defense would have barred an action on the underlying claim had it been commenced in a state court.<sup>113</sup> The defense must be asserted promptly after receipt of a demand for arbitration, for failure to act quickly may result in a waiver of the defense.<sup>114</sup> Although the procedure for asserting the time-bar defense is well established, the criteria for determining the statute of limitations applicable to an arbitration proceeding have been less clearly delineated.<sup>115</sup> Recently, in *Paver & Wildfoerster v. Catholic High School Association*,<sup>116</sup> the Court of Appeals held that arbitration will be time barred only if on no view of the facts could the claim withstand a time-bar challenge in an action at law.<sup>117</sup>

In *Paver*, the appellant-architects designed and supervised the construction of the respondent school association's high school. The contract contained a broad arbitration clause which referred all future disputes arising under the contract to arbitration. When the building began to leak, the school association demanded arbi-

---

<sup>113</sup> CPLR 7502(b) provides in pertinent part:

If, at the time that a demand for arbitration was made or a notice of intention to arbitrate was served, the claim sought to be arbitrated would have been barred by limitation of time had it been asserted in a court of the state, a party may assert the limitation as a bar to the arbitration . . . .

Where compliance with time limitations is a condition precedent to arbitration, the timeliness of a demand for arbitration will be determined by the court. See *Board of Educ. v. Heckler Elec. Co.*, 7 N.Y.2d 476, 481-82, 166 N.E.2d 666, 668-69, 199 N.Y.S.2d 649, 652-53 (1960).

<sup>114</sup> Service of a demand for arbitration or notice of intention to arbitrate is a common procedure for the commencement of arbitration proceedings. The demand or notice usually contains the 20-day preclusion caveat specified in CPLR 7503(c). Failure to move to stay the arbitration within the allotted 20 days or participation in the arbitration proceedings waives the defense that "... a valid agreement was not made or has not been complied with and ... [also waives] the bar of a limitation of time ..." CPLR 7503(c).

<sup>115</sup> Compare *Naetzker v. Brocton Cent. School Dist.*, 50 App. Div. 2d 142, 376 N.Y.S.2d 300 (4th Dep't 1975) (applied tort limitation period in barring arbitration of a claim for architect's malpractice), with *In re Three Sofia Bros.*, 190 Misc. 891, 76 N.Y.S.2d 237 (Sup. Ct. N.Y. County 1947) (applied contract statute of limitations although damage was caused by negligence).

<sup>116</sup> 38 N.Y.2d 669, 345 N.E.2d 565, 382 N.Y.S.2d 22 (1976). Chief Judge Breitel authored the majority opinion.

<sup>117</sup> *Id.* at 677-78, 345 N.E.2d at 570, 382 N.Y.S.2d at 26-27.